

INTELSAT's activities. *Cf.* H.R. Rep. No. 102-207, at 26 (Section 9 regulatory "[f]ees will not be applied to space stations operated by international organizations subject to the [IOIA]."). Accordingly, the FCC errs when it asserts that any regulatory costs not paid by COMSAT must necessarily be paid by COMSAT's competitors. *See* FCC Br. at 32-33.

In any event, because (as discussed *supra* note 1) INTELSAT has now been privatized and COMSAT is no longer the U.S. Signatory, the only periods for which COMSAT will be charged the space station fees at issue are fiscal years 2000 and 2001.¹⁰ COMSAT has already paid the fees under protest for fiscal year 2000; the FCC has already set the amount of the fee for fiscal year 2001; and by the time of oral argument, COMSAT will have paid (under protest) for that year as well. If COMSAT ultimately obtains a refund of the disputed amounts, the FCC will not seek to recoup those amounts from COMSAT's competitors or any other fee payers, any more than it did when it had to refund the unlawful Signatory fee. Rather, COMSAT will be reimbursed by the U.S. Treasury. The FCC's attempt to raise the shibboleth of "cost shifting" must be rejected.

¹⁰ In all subsequent years, this obligation will fall to Intelsat LLC, as the U.S.-licensed operator of the now-privatized INTELSAT system.

IV. THE COMMISSION FAILS TO DEFEND ITS ARBITRARY AND CAPRICIOUS REFUSAL TO PRORATE ANY REGULATORY FEES THAT MIGHT BE ASSESSED AGAINST COMSAT.

The FCC's brief ignores most of COMSAT's arguments concerning why proration would be justified in the event the Court were to find that space station regulatory fees may be imposed on COMSAT in connection with INTELSAT space stations. Instead, the agency makes a series of irrelevant observations and then tries to weave those comments into a coherent response. That effort fails.

First, the Commission asserts that proration is inappropriate because COMSAT is the "sole U.S. investor" in INTELSAT and the only U.S. user authorized to participate in the launch of INTELSAT satellites. FCC Br. at 37. However, those statements provide no basis for singling out COMSAT to pay 100 percent of any regulatory fees assessed against INTELSAT space stations. While COMSAT, as U.S. Signatory, was the statutorily-designated U.S. investor in INTELSAT during fiscal year 2000, COMSAT was just one of six INTELSAT Signatory/investors with U.S. subsidiaries, parents, or affiliates that also provided INTELSAT service in the United States. *See* COMSAT Br. at 19-20 n.12 (identifying the other five). Moreover, the authorizations on which the FCC relies expressly recognize that COMSAT has only a minority interest in INTELSAT satellites. *See, e.g., INTELSAT VIII-A Order*, 13 F.C.C. Rcd at 16628 (noting

COMSAT's then "current ownership share of 17.95%"). Thus, far from supporting the FCC's refusal to prorate, these orders actually demonstrate that proration would be appropriate.

Second, the Commission points out that COMSAT's Section 8 application fees have not been prorated, and seeks an "explanation why Section 9 fees must be prorated on the basis of Intelsat ownership or usage, but Section 8 [fees] need not." FCC Br. at 37. The explanation is this: the COMSAT applications at issue here concern the investment of COMSAT's money—and no one else's—in new INTELSAT projects. Accordingly, the "benefits" of the FCC's review of those applications run directly and exclusively to COMSAT. In contrast, the benefits of INTELSAT's operation of its 17-satellite global fleet run to hundreds of INTELSAT Signatories and direct access users, of which COMSAT is only one.

Third, the FCC asserts that it "previously rejected proposals to base the space station fee on usage." FCC Br. at 38. In fact, as the language quoted in the agency's brief shows, the FCC did no such thing; rather, it rejected proposals to assess the fee on a "per transponder," rather than "per satellite," basis. *Assessment and Collection of Regulatory Fees for Fiscal Year 1995. Report and Order*, 10 F.C.C. Rcd 13512, 13550-551 (1995). It is indeed true that a satellite's *capacity* generally has no bearing on the amount of the space station fee. Thus, for

example, even if one U.S.-licensed satellite can carry twice as much traffic as another, both satellites presumptively must pay the same annual regulatory fee. However, that fact does not provide a rationale for requiring COMSAT to pay 100 percent of fees assessed on satellites that COMSAT does not own, operate, or, in some cases, even use to provide service.

COMSAT has not sought proration on the ground that INTELSAT satellites are smaller, or contain fewer transponders, than those of its competitors. Nor has COMSAT predicated its claim for proration on the fact that it has sublet to its customers a portion of the satellite space segment capacity that it leases from INTELSAT. Rather, COMSAT's claim is based on the fact that it is unable to access more than a small portion of the satellites' capacity because the satellites' owner—INTELSAT—leases the vast majority of that capacity to other users.¹¹

¹¹ In this regard, and contrary to PanAmSat's spurious claims, the Commission is well aware that COMSAT does not have "access to 100 percent of the capacity on Intelsat's satellites." PanAmSat Br. at 19. *See Availability of INTELSAT Space Segment Capacity to Users and Service Providers Seeking to Access INTELSAT Directly*, 15 F.C.C. Rcd 19160, 19175 (2000) (finding that "both Comsat and direct access users . . . have reported difficulty in obtaining [INTELSAT] capacity to satisfy customer needs. The difficulties primarily are due to capacity shortages caused by high demand. . . ."). For this reason, it is fanciful for PanAmSat to suggest that COMSAT's 17 percent utilization somehow reflects the fact that COMSAT "has been able to sell only 17 percent of the capacity." PanAmSat Br. at 19. To the contrary, the very purpose of INTELSAT—to operate "a single global commercial telecommunications satellite

(continued)

COMSAT's situation is thus quite different from that of an owner/licensee who chooses to sublet some of its transponders to a third party. In such a case, the licensee could require the lessee to pay a portion of the regulatory fees as a term of the lease (or could simply factor the cost of such fees into the lease price for the satellite capacity). In contrast, COMSAT has no ability to prevent the hundreds of other INTELSAT Signatories and direct access users the world from obtaining their own satellite capacity directly from INTELSAT.

Finally, even though Section 9(g) generally requires space station regulatory fees to be applied "per space station." Section 9(d) provides for exceptions to this general rule by allowing the FCC to "waive, reduce, or defer payment of a fee in any specific instance for good cause shown, where such action would promote the public interest." 47 U.S.C. § 159(d) (1994 & Supp. 2000). On at least one occasion, in a similar circumstance involving another "shared" satellite system, the FCC applied Section 9(d) to arrive at an appropriate proration of this fee. See COMSAT Br. at 55-57 (discussing *Application of Columbia Communications Corp., For Partial Waiver of Its Regulatory Fee Payment for Two Geostationary*

system . . . which will provide expanded telecommunications services to all areas of the world." INTELSAT Agreement Preamble, 23 U.S.T. at 3814—would be thwarted if a single U.S. company were able to procure for itself all of the world's INTELSAT capacity.

Space Stations, 14 F.C.C. Rcd 1122 (1999)). Here, COMSAT has shown ample "good cause" why its claim for proration to reflect the company's 17 percent utilization share in INTELSAT is at least as compelling as the proration claim that was sustained by the FCC in *Columbia*. See COMSAT Br. at 54-58. Yet the FCC's brief does not even address any of the arguments on this point advanced in COMSAT's brief. See FCC Br. at 38-39.

CONCLUSION

For the reasons set forth herein, COMSAT's petition for review should be granted and the pertinent portions (Paragraphs 16-27 & 48-50, and Attachment A Paragraph 29) of the Commission's *FY 2000 Order*, 15 F.C.C. Rcd at 14485-490, 14497, 14516 (J.A. 6-8, 12, 21), imposing regulatory fees on COMSAT for satellite capacity owned by INTELSAT should be vacated. COMSAT requests a refund of all Section 9 regulatory fees for INTELSAT space stations that it paid pursuant to the *FY 2000 Order* (\$1,609,050), plus interest calculated from September 15, 2000, up to and including the date of the refund.

If, *arguendo*, fiscal year 2000 regulatory fees may be assessed against COMSAT in connection with INTELSAT space stations, then such an assessment should be prorated and COMSAT should recover a partial refund as detailed in COMSAT's Initial Brief.

Respectfully submitted.

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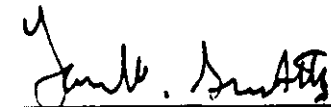
CERTIFICATE OF SERVICE

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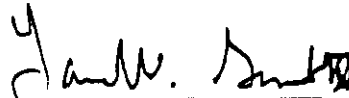


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Pursuant to Fed. R. App. P. 32(a)(7)(c), I hereby certify that, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Cir. R. 32(a)(2), this brief complies with the applicable type-volume limitations: it contains 6,728 words as counted by Microsoft Word 6.0, the word-processing software used to prepare this brief.

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Re: *COMSAT Corporation/ COMSAT World Systems Annual Regulatory Fees*

Dear Mr. Fishel:

COMSAT Corporation, a subsidiary of Lockheed Martin Global Telecommunications, LLC, herein submits a petition for reduction made pursuant to 47 C.F.R. § 1.1166, in conjunction with its payment of \$1,668,125 in annual space station regulatory fees for 17 space stations that were owned and operated by INTELSAT at the start of fiscal year 2001.¹

I. PETITION FOR RECONSIDERATION

On August 6, 2001, COMSAT filed a Petition for Reconsideration of the Commission's Final Order captioned *In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2001*, 66 Fed. Reg. 36,177 (July 11, 2001) (the "FY 2001 Order"). COMSAT's Petition for Reconsideration is based upon the arguments set forth in COMSAT's briefs in support of its challenge to the Commission's Final Order captioned *In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2000*, 15 F.C.C. Rcd 14478 (2000), which is currently

¹ These satellites are: Satellite 511 (330.5° E.L.); Satellite 601 (325.5° E.L.); Satellite 602 (62.0° E.L.); Satellite 603 (335.5° E.L.); Satellite 604 (60.0° E.L.); Satellite 605 (332.5° E.L.); Satellite 701 (180.0° E.L.); Satellite 702 (177.0° E.L.); Satellite 704 (66.0° E.L.); Satellite 705 (342.0° E.L.); Satellite 706 (307.0° E.L.); Satellite 707 (359.0° E.L.); Satellite 709 (310.0° E.L.); Satellite 801 (328.5° E.L.); Satellite 802 (174.0° E.L.); Satellite 804 (64.0° E.L.); and Satellite 805 (304.5° E.L.). As the Commission is well aware, INTELSAT privatized on July 18, 2001 and simultaneously became the space station licensee for the above-listed satellites pursuant to the *Applications of Intelsat LLC, Memorandum Opinion and Authorization*, 15 F.C.C. Rcd 15460 (2000), *reconsideration denied, Intelsat LLC, Order on Reconsideration*, 15 F.C.C. Rcd 25234 (2000). The FCC has not requested that Intelsat LLC pay any fees on these satellites for fiscal year 2001, even though the satellites were licensed to Intelsat LLC for a portion of fiscal year 2001.

Federal Communications Commission
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pending in the United States Court of Appeals for the District of Columbia Circuit. *See* Final Brief for the Petitioner, *COMSAT Corp. v. FCC, et al.* (D.C. Cir., filed Aug. 13, 2001) (No. 00-1458) and Final Reply Brief for the Petitioner, *COMSAT Corp. v. FCC, et al.* (D.C. Cir., filed Aug. 13, 2001) (No. 00-1458). The Commission has not acted upon COMSAT's Petition for Reconsideration. If the Commission acts favorably on COMSAT's Petition for Reconsideration, then the enclosed payment should be refunded.

II. REQUEST FOR FEE REDUCTION

If the Commission declines to grant COMSAT's Petition for Reconsideration and invalidate the portion of the *FY 2001 Order* that applies to COMSAT's required payment for INTELSAT satellites, the Commission should nonetheless reduce COMSAT's regulatory fee payment relating to the INTELSAT satellites because "good cause" exists for such a reduction and "reduction . . . would promote the public interest." 47 C.F.R. § 1.1166.² There is good cause for such a reduction, and such a reduction is in the public interest because: (1) INTELSAT satellites were neither regulated nor licensed by the Commission; and (2) COMSAT utilized only 17 percent of the capacity of those satellites.

A. COMSAT's Regulatory Fees For The INTELSAT Space Stations Should Be Reduced To Zero.

The Commission may not assess regulatory fees in any amount on COMSAT for the INTELSAT satellites because those satellites were neither regulated by the Commission nor subject to regulatory fees under 47 U.S.C. §159 during the relevant time period. Title 47 U.S.C. §159(g) imposes fees on "Space Station[s] per operational station in geosynchronous orbit" (47 CFR Part 25)." Because the INTELSAT satellites were not regulated by the FCC pursuant to Part 25 of the Commission's Rules or otherwise, INTELSAT space stations were not subject to Section 9 regulatory fees. Neither COMSAT's activities regulated under 47 U.S.C. §158 nor the company's involvement in the financing and governance of INTELSAT justifies the agency's departure from 47 U.S.C. §159's clear requirement that a "space station" be regulated under "47 CFR Part 25" before space station regulatory fees may be assessed on it. For this reason, COMSAT's regulatory fee obligation relating to the INTELSAT satellites is zero.

B. At A Minimum, COMSAT's Regulatory Fees Should Be Reduced To Reflect COMSAT's Percentage Of Use Of The INTELSAT System.

Even if the Commission insists on imposing regulatory fees on COMSAT for INTELSAT space stations that were not licensed or regulated by the FCC during the relevant time period,

² COMSAT does not contest other regulatory fees assessed on its non-INTELSAT facilities and international bearer circuits, which have been paid under separate cover.

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Annual Regulatory Fees for INTELSAT Space Stations
Page 3 of 4

COMSAT's fees should be reduced, at a minimum, to reflect the company's percentage of use of the INTELSAT system. The Commission's rules specifically contemplate that a fee reduction can be granted in the case of "shared use" of facilities. *See* 47 C.F.R. § 1.1163(c)(1) ("The fees assessed shall: Be . . . adjusted to take into account factors that are reasonably related to the benefits provided to the payor of the fee by the Commission's activities, including such factors as service coverage area, *shared use versus exclusive use*, and other factors that the Commission determines are necessary in the public interest.") (emphasis added).

COMSAT used about 17 percent of INTELSAT space segment capacity during fiscal year 2001.³ Although COMSAT served as the U.S. Signatory to INTELSAT prior to privatization, it is important to recognize that COMSAT does not (and never did) own the space stations, direct their operations, or control utilization of the INTELSAT system (as INTELSAT was an intergovernmental organization comprised of 143 member nations that operated much like a cooperative).⁴ Moreover, since November 1999, U.S. carriers and users have been authorized "to obtain direct access to INTELSAT telecommunications services and space segment capacity through purchases of such capacity or services from INTELSAT" directly, and have not been required to obtain this capacity through COMSAT. 47 U.S.C. § 765(a); *see Direct Access to the INTELSAT System*, 14 F.C.C. Rcd 15703 (1999), *appeal dismissed*, No. 99-1412 (D.C. Cir. Mar. 29, 2000). COMSAT therefore does not possess, with respect to INTELSAT satellites, valuable rights typically enjoyed by licensees. Thus, any obligation on the part of COMSAT to pay regulatory fees based upon INTELSAT space stations should be based upon COMSAT's percentage of utilization of the system, and not upon 100 percent of INTELSAT capacity.

III. CONCLUSION

By its payment of regulatory fees consistent with the *FY 2001 Order*, COMSAT should not be viewed as having waived or relinquished any of its rights to pursue and obtain a refund of the monies paid.

Enclosed is a Duplicate Original copy for our records. Please stamp the Duplicate Original and return it to the undersigned in the enclosed postage prepaid envelope.

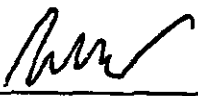
³ U.S. direct access customers accounted for about 2 percent of INTELSAT system utilization in fiscal year 2001. The remaining 81 percent of the system was utilized by foreign Signatories and direct access customers.

⁴ Moreover, COMSAT, as U.S. Signatory, had only a 20.4 percent ownership interest in the INTELSAT organization at the start of fiscal year 2001.

**Federal Communications Commission
Annual Regulatory Fees for INTELSAT Space Stations
Page 4 of 4**

Respectfully submitted,

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COMSAT World Systems**

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In the Matter of
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Fiscal Year 2001

MD Docket No. 01-76

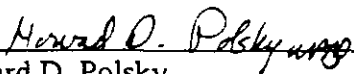
To: The Commission

**COMSAT CORPORATION'S NOTICE OF ERRATA TO
PETITION FOR RECONSIDERATION**

On August 6, 2001, COMSAT Corporation ("COMSAT") timely petitioned for reconsideration of Paragraphs 29, 39, 42, and 43, and Attachment A Paragraph 22 of the *Report and Order* in the above-captioned proceeding, *Assessment and Collection of Regulatory Fees for Fiscal Year 2001*, FCC 01-196, MD Docket No. 01-76, 66 Fed. Reg. 36177 (July 11, 2001) ("*FY 2001 Order*").


Due to a miscommunication between COMSAT's attorneys and its Finance Personnel, the Petition stated that COMSAT used 19 percent of the space segment capacity of the INTELSAT system in fiscal year 2001. *See Petition for Reconsideration* at 4. The 19 percent figure stated by COMSAT is incorrect. Rather, COMSAT used only 17 percent of INTELSAT capacity in fiscal year 2001. The remaining 2 percent that COMSAT had included to arrive at the 19 percent figure was used by U.S. direct access customers, not by COMSAT.

Respectfully submitted,


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**Before the
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In the Matter of
Assessment and Collection
of Regulatory Fees for
Fiscal Year 2001

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MD Docket No. 01-76

To: The Commission

CERTIFICATE OF SERVICE

I hereby certify that on this eleventh day of October, 2001, I caused copies of the foregoing "Comsat Corporation's Notice of Errata to Petition for Reconsideration" to be dispatched by hand to all parties listed below:

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No. 00-1458

**BEFORE THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

COMSAT CORPORATION, Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA, Respondents,

and

PANAMSAT CORPORATION, Intervenor

**ON PETITION FOR REVIEW OF A FINAL RULEMAKING ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION**

FINAL REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION AND SUMMARY

The Federal Communications Commission ("FCC" or "agency") does not attempt to demonstrate that its imposition of space station fees on INTELSAT satellites is targeted to recover costs associated with regulating those satellites. The reason for this failure is apparent: there *are* no such costs, because INTELSAT satellites are not subject to FCC jurisdiction.¹ Rather, the agency admits that its unprecedented imposition of this fee on COMSAT is an attempt to recover the same costs it sought to recover when it created the unlawful "Signatory Fee," which this Court invalidated in its 1997 *COMSAT* decision. The FCC reads that decision as authorizing it to collect these same costs so long as it does so by including them in an existing fee category. But there has been no change in the agency's regulatory activities that could justify expanding the scope of the space station fee. And, in any event, the FCC fails to explain how the costs it incurs as a result of COMSAT's Signatory relationship with INTELSAT can

¹ On July 18, 2001, INTELSAT completed privatization of its commercial operations and transferred ownership of its satellites to a successor entity, Intelsat LLC, which then became an FCC licensee. At the same time, COMSAT ceased to be the U.S. Signatory to INTELSAT. Except in one respect (*see infra* Section III, at p. 23), none of these recent changes has any bearing on this appeal, which deals with the Commission's authority to assess fees for fiscal year 2000. Thus, for ease of reading, this brief is written in the present tense, even though certain statements do not reflect current reality.